

No. 21-____

IN THE
Supreme Court of the United States

CHARLES JAMES,

Petitioner,

v.

THOMSON SAILORS HOMES, L.L.C., THOMSON HOMES, L.L.C., DONALD SAILORS,
EDWARD B. THOMSON, III, TEAM 3 ARCHITECTS, INC., BRUCE H. BEATTY,
BOBBY SAILORS, ERIC BRADLEY THOMSON, ELSWOOD SMITH CARLSON, P.A.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The most important questions for any form of intellectual property are what gets protection, *i.e.*, the subject matter, and the scope of that protection, *i.e.*, the test of infringement. This Petition pertains to an acknowledged Circuit split regarding the scope of copyright protection for architectural works.

Here, the architectural works in question incorporated an extremely rare residential home-design feature—a prominently placed triangular atrium—but differed in other respects. Under the standard test of copyright infringement, a qualitatively significant similarity is sufficient for the infringement question to go to a jury, even if the two works otherwise differ. This standard approach is used by the First, Second, Fourth, and Tenth Circuits for architectural works in copyright.

The Eleventh Circuit, however, employs an architecture-specific standard that gives architectural works the “least, narrowest, or ‘thinnest’ protection.” The Eleventh Circuit’s standard bars infringement claims from going to a jury if the infringer can identify any differences, even mere “minor dimensional discrepancies” or “incremental modifications.” Below, the Eighth Circuit focused on “differences” rather than similarities—joining the Eleventh Circuit and deepening an acknowledged Circuit split regarding the doctrinal test for infringement of architectural works in copyright.

The questions presented are:

(1) Does the Copyright Act support an architecture-specific test of infringement that gives the thinnest scope of protection?

(2) Does the defiance below of this Court’s prohibition in Fogerty and Kirtsaeng against presumptive fee-shifting in copyright—and the pervasive deviations from Fogerty by the Fifth, Sixth and Seventh Circuits—justify the exercise of this Court’s supervisory powers?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are listed in the caption with one exception: Designworks Homes, Inc. (“Designworks”).

Designworks was a plaintiff-appellant below that intended to petition to this Court but was prevented from proceeding *in forma pauperis*. Accordingly, Designworks respectfully requests the right to brief this Court regarding alternative procedures that would permit it to join this Petition as a petitioner.¹

¹ Designworks is unable to join this Petition because Petitioner James, the sole owner of Designworks, is unable to afford the not-insubstantial costs of both the \$300 filing fee and the printing of forty copies of the booklet format. See Sup. Ct. R. 33.1(a), 33.1(f), 38(a). The usual failsafe for those of limited means—proceeding *in forma pauperis*—is not available because Designworks is a corporate entity, not a natural person. See Rowland v. California Men’s Colony, 506 U.S. 194, 196 (1993) (“[O]nly a natural person may qualify for treatment *in forma pauperis* under § 1915.”).

Petitioner James and Designworks respectfully but vigorously disagree with the Court’s decision in Rowland. See id. at 213 (Thomas, J., dissenting) (“I see no basis for concluding that an association is not entitled to *in forma pauperis* status.”). If this Court would entertain a motion or other briefing on this question, respectfully it should construe Designworks as a Petitioner on this Petition who also seeks to petition this Court for a writ of certiorari and stands ready to apprise the Court whether Rowland is distinguishable or can be limited, either through a motion or brief or as otherwise instructed.

For example, consider that Rowland construes 28 U.S.C. § 1915(a), the *in forma pauperis* statute. Id. at 195. Yet, Rowland does not construe 28 U.S.C. § 1911 in any manner. See generally id. (nowhere mentioning §1911). And, nothing in the pertinent provision of Section 1911—“The Supreme Court may fix the fees to be charged by its clerk.”—appears to prohibit a modified fee schedule, or orders, in specific cases, that accommodate impecunious persons other than natural persons. Furthermore, the expense of preparation of the booklet format does not appear to be imposed by statute but by Court rule. See Sup. Ct. R. 33.1(a), 33.1(f). Thus, it seems that this Court could make accommodations for impecunious entities without revisiting Rowland. Perhaps, this Court could rule on motions that are similar in substance to a motion to proceed *in forma pauperis* but that instead arise under this Court’s §1911 authority, not §1915(a).

CORPORATE DISCLOSURE STATEMENT

Petitioner James is a natural person. If it is permitted to be a petitioner, Designworks Homes declares (i) that it is a corporation that has no parent corporation, and (ii) that no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

The directly related proceedings are:

- Designworks Homes, Inc. v. Thomson Sailors Homes, L.L.C., No. 19-3458 (8th Cir. Aug. 19, 2021);
- Designworks Homes, Inc. v. Thomson Sailors Homes, LLC, No. 4:18-cv-189-SRB (W.D. Mo. Oct. 10, 2019).²

² Petitioner James and Designworks are respondents in No. 21-1217, where this Court has called for a response. The petition in No. 21-1217, however, stems from different underlying cases in the District Court and, so, is not directly related. See Sup. Ct. R. 14.1(b)(iii) (defining “directly related”).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Charles James and, if allowed, Designworks Homes, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion (Pet. App. 1a-7a) is reported at 9 F.4th 961. The District Court's summary-judgment order (Pet. App. 8a-15a) is not reported but is available at 2019 U.S. Dist. LEXIS 176185. The District Court's fee order (Pet. App. 16a-20a) is also not reported but is available at 2019 U.S. Dist. LEXIS 225262. The Eighth Circuit's denial of rehearing (Pet. App. 21a) is not reported but is available at 2021 U.S. App. LEXIS 31588.

JURISDICTIONAL STATEMENT

The Eighth Circuit entered judgment on August 19, 2021. A timely petition for rehearing was denied on October 19, 2021. Justice Kavanaugh extended the time to petition for a writ of certiorari until March 18, 2022. No. 21A309. This Court has appellate jurisdiction. 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

- Section 101 of Title 17 of the United States Code provides, in relevant part:

§ 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

[...]

An “architectural work” is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

[...]

- Section 505 of Title 17 of the United States Code provides:

§ 505. Remedies for infringement: Costs and attorney’s fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.

STATEMENT OF THE CASE

1. Petitioner Charles James has devoted his life to the creation of unique and innovative residential home designs, most recently under the auspices of his home design-and-build company, Designworks Homes, Inc. Pet. App. 9a. In the late 1990s, Mr. James created an innovative and award-winning home design that featured a prominent triangular-atrium feature quite unlike any feature he had ever witnessed in a home design beforehand. Pet. App. 6a (floor plan). Seen from the moment one enters the house, his triangular-atrium feature captures a viewer's attention from the get-go. Not many homes have *any* triangular design—let alone a design centered around a triangular-atrium feature.

2. This triangular-atrium feature became the centerpiece of many houses that Mr. James built and sold (for above-market prices) in and around Columbia, Missouri. In 2004, Mr. James applied for copyright registration and the U.S. Copyright Office issued a registration certificate that included his triangular-atrium design. Pet. App. 9a. He considers this award-winning design to be his life's greatest accomplishment. Around 2017, he came across houses designed and built by Respondents in and around Kansas City, Missouri, that used a highly similar triangular-atrium feature—a feature that he had never seen in any other homes except the ones he himself had designed and built.

3. To date and as far as Mr. James can tell, no home in the State of Missouri—other than the ones that Mr. James built and those built by Respondents—has such a triangular-atrium feature. Mr. James was especially concerned about infringement of his home designs here because construction of Respondents' houses had begun shortly after Mr. James' unique triangular-atrium design became publicly accessible.

4. After pre-suit discussions were unavailing, Mr. James went to court, suing for copyright infringement of his home designs in the U.S. District Court for the Western District of Missouri.

5. Copyright infringement is traditionally decided by application of a substantial-similarity analysis that, as its name suggests, is conducted by “focusing on objective *similarities* in the details of the works.” E.g., Rottlund Co. v. Pinnacle Corp., 452 F.3d 726, 731 (8th Cir. 2006) (emphasis added). Under a copyright similarity analysis, even if an infringer doesn’t copy the entirety of a work, the infringer still has to compensate the original creator for the portion of the work that they did take.

6. This makes sense. By analogy, a pickpocket is punished for what he took, not excused for what he didn’t. The same is true in copyright: a similarity analysis usually focuses on what *was* taken, not what *wasn’t*. See Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936) (Hand, J.) (“[N]o plagiarist can excuse the wrong by showing how much of his work he did not pirate.”).

7. At summary judgment, the District Court did not focus on similarities. Instead, it focused on “objective *differences*” between Petitioners’ and Respondents’ designs. Pet. App. 14a (emphasis added).

8. It did so by applying Eleventh Circuit law for the proposition that a different legal test of copyright infringement applies in the context of architectural designs. Pet. App. 14a (citing Howard v. Sterchi, 974 F.2d 1272, 1276 (11th Cir. 1992)). Accordingly, even though Petitioners’ designs and Respondents’ designs share an extraordinarily rare and prominent feature, the District Court granted summary judgment to Respondents on the grounds that the designs had a number of differences.

9. After summary judgment, Respondents asked for copyright fee-shifting against Mr. James.

10. Pertinently, this Court has spoken on copyright fees-shifting twice. First, in Fogerty v. Fantasy, Inc., this Court “reject[ed]” the argument that the prevailing party “should be awarded attorney’s fees as a matter of course[.]” 510 U.S. 517, 533 (1994). Second, in Kirtsaeng v. John Wiley & Sons, Inc., this Court provided “additional guidance” regarding copyright fees. 579 U.S. 197, 203 (2016). It emphasized the “objective reasonableness” of the losing party’s positions as an “important factor” weighing on whether to award copyright fees. Id. at 208. In responding to concerns about the objective-reasonableness factor, this Court cautioned lower courts against “conflat[ing] two different questions”—against conflating the merits outcome with whether “serious arguments” were made by the losing party. Id.

11. This Court did not mince words on what should happen if a lower court conflated those questions: “if some court confuses the issue of liability with that of reasonableness, its fee award should be reversed for abuse of discretion.” Id.

12. Mr. James, however, did not get the benefit of this Court’s central holdings from Fogerty and Kirtsaeng. The District Court held that copyright fees are the “rule rather than the exception and should be awarded routinely.” Pet. App. 17a (emphasis added).³

13. Given that it mistakenly thought the governing legal standard says fees “should” be awarded, the District Court understandably devoted a mere four sentences to applying the Fogerty factors. Pet. App. 18a (last paragraph). It then awarded over \$400,000 in fees and costs against Mr. James. Pet. App. 19a.

³ But see 17 U.S.C. § 505 (“[T]he court may also award a reasonable attorney’s fee[.]”) (emphasis added); Kirtsaeng, 579 U.S. at 210 n.1 (seeming to disapprove of rule-rather-than-exception language in Hogan Sys. v. Cybresource Int’l, Inc., 158 F.3d 319, 325 (5th Cir. 1998), for “presuming that a prevailing party receives fees”).

14. In its four sentences of fees analysis, the District Court ran afoul of Kirtsaeng's admonition: it decided the objective-reasonableness factor by mere reference back to its own "order on summary judgment[,]” Pet. App. 18a—conflating the merits issue of liability with the fees issue of reasonableness.

15. Mr. James and Designworks appealed.

16. On the merits, the Eighth Circuit acknowledged that “one feature of both designs is a triangular atrium” but chose instead to focus on what it viewed as “plenty of *differences*” in the designs. Pet. App. 4a (emphasis added). Thus, the Eighth Circuit too conducted a *differences* analysis. Furthermore, the Eighth Circuit suggested that similarity as to an extremely rare design feature was insufficient because the “total concept and feel” of the overall design was not similar in its view. Pet. App. 4.

17. Thus, the Eighth Circuit affirmed on the merits.

18. On fees, the Eighth Circuit acknowledged that the District Court used the wrong legal standard for deciding copyright fees. It said so expressly. Pet. App. 5a (“To be sure, the district court was wrong to say that attorney fees ‘are the rule rather than the exception and *should* be awarded routinely’ in cases like this one.” (emphasis from Eighth Circuit)). The Eighth Circuit even quoted this Court’s point that the application of the wrong standard would “pretermitt the exercise of that discretion” when deciding fees in copyright. Pet. App. 5a (quoting Fogerty, 510 U.S. at 533).

19. Even so, the Eighth Circuit affirmed an award of \$400,000 in fees against Mr. James despite the fact that the wrong legal standard had been applied below. Cf. Fox v. Vice, 563 U.S. 826, 829 (2011) (“*But here we must vacate the judgment below because the court used a different and incorrect standard in awarding fees.*” (emphasis added)).

20. The Eighth Circuit affirmed on fees without anywhere acknowledging or addressing the point, articulated at length in the briefing below, that the District Court had done what this Court has instructed courts not to do: the District Court had conflated the merits issue of liability with the fees issue of reasonableness. See Kirtsaeng, 579 U.S. at 208 (“[I]f some court confuses the issue of liability with that of reasonableness, its fee award should be reversed for abuse of discretion.” (emphasis added)).⁴

21. Accordingly, this Petition presents two issues. First, this Petition asks the Court to resolve an acknowledged Circuit split regarding how to conduct an infringement analysis for architectural copyrights, *i.e.*, whether to assess similarities for architectural works or to discount them due to differences. Second, this Petition also asks this Court to exercise its supervisory powers with respect to widespread deviations from its holdings on copyright fees, both below and in a number of Circuits.

⁴ Because the District Court thought fees “should” be awarded, it is far from clear that the District Court would have awarded \$400,000 in fees against an individual copyright holder of modest means had it known the proper standard and the full extent of its discretion to *deny* fees. The Eighth Circuit was “convinced that the district court knew it had discretion and exercised it properly.” Pet. App. 6a (emphasis added). It’s not clear why the Eighth Circuit was so convinced. The District Court thought that fees “should be awarded routinely”—which is a far cry from the discretionary “may” found in the statute and discussed in Fogerty and Kirtsaeng. It’s not at all apparent to Petitioner James that the District Court was aware it could deny fees.

REASONS FOR GRANTING THE WRIT

I. **THE EIGHTH CIRCUIT ADOPTED A DIFFERENCES ANALYSIS FOR ARCHITECTURAL COPYRIGHTS, DEEPENING AN ACKNOWLEDGED CIRCUIT SPLIT AND FUNCTIONALLY ELIMINATING MUCH OF THE COPYRIGHT PROTECTION AFFORDED TO ARCHITECTURAL WORKS.**

22. Below, the Eighth Circuit deepened an acknowledged Circuit split on the test of infringement, *i.e.*, the scope of protection, for architectural works in copyright. See Section I.A, *infra*. The Eighth Circuit joined the wrong side of that split—wrong because the governing statute, the Copyright Act, does not support the differences-focused infringement analysis conducted by the Eighth Circuit. See Section I.B, *infra*. Furthermore, this split presents a profoundly important question because the differences approach functionally vitiates the rights that Congress created in architectural works.

A. **The Eighth Circuit used a flawed differences approach, deepening an acknowledged Circuit split on whether similarities or differences are determinative of infringement for architectural works.**

23. For a long time, there was legal uncertainty about the status of copyright protection for buildings. Design Basics, LLC v. Signature Constr., Inc., 994 F.3d 879, 886 (7th Cir. 2021). Yet, in 1990, Congress made clear through the enactment of the Architectural Works Copyright Protection Act (“AWCPA”) that architectural works, including buildings, were covered by copyright. Id.

24. Among the AWCPA’s many statutory confirmations that architects’ artistic achievements were protected, perhaps the most prominent was Congress’ addition of a new type of work—“architectural works”—to the Copyright Act’s list of protected works. See id.; Humphreys & Partners Architects, L.P. v. Lessard Design, Inc., 790 F.3d 532, 537 (4th Cir. 2015); 17 U.S.C. § 102(a)(8) (including “architectural works” as protected category of copyrighted works); 17 U.S.C. § 101 (defining “architectural works”).

25. The AWCPA's statutory answers, however, led to newfound statutory questions. Since the AWCPA's passage, the question frequently arose how to determine when an architect's rights are infringed, *i.e.*, what test of infringement to use in the case of architectural works. As the issue percolated for three decades, two competing approaches emerged.

26. The first approach focuses on *similarities*. This approach rests on the rationale that "architectural works are subject to the same standards that apply to other copyrightable works[.]" Attia v. Society of the N.Y. Hosp., 201 F.3d 50, 60 n.3 (2d Cir. 1999) (quoting NIMMER ON COPYRIGHT § 2.20, at 2-216 (1998)).

27. Accordingly, the same test of "infringement via substantial similarity [is] as applicable here as throughout the balance of copyright law." Id. Under this approach, courts simply apply the same substantial-similarity test to architectural works that they employ in a "variety of copyright contexts[.]" E.g., Humphreys, 790 F.3d at 538.

28. One significant aspect of the standard substantial-similarity test is worth highlighting. The focus on similarities means that the "mere existence of differences is insufficient to end the matter in the defendant's favor." T-Peg, Inc. v. Vt. Timber Works, Inc., 459 F.3d 97, 112 (1st Cir. 2006).

29. This similarities approach is the majority rule. E.g., T-Peg, 459 F.3d at 112 (1st Cir. 2006) (applying standard similarity test); Zalewski v. Cicero Builder Dev. Inc., 754 F.3d 95, 104 (2d Cir. 2014) ("Courts should treat architectural copyrights no differently than other copyrights."); Humphreys, 790 F.3d at 537 (4th Cir. 2015) (same); Charles W. Ross Builder, Inc. v. Olsen Fine Home Bldg., LLC, 496 F. App'x 314, 319-320 (4th Cir. 2012) (use of standard similarity test applies in many "copyright contexts" including architectural works); Savant Homes, Inc. v. Collins, 809 F.3d 1133, 1138 (10th Cir. 2007) (applying standard similarities test).

30. The second approach focuses on *differences*. Coined by the Eleventh Circuit, this differences approach rests on the theory that architectural works should be afforded the “the least, narrowest or ‘thinnest’ protection” under the Copyright Act. Intervest Constr., Inc. v. Canterbury Estate Homes, Inc., 554 F.3d 914, 921 (11th Cir. 2008); Miller’s Ale House, Inc. v. Boynton Carolina Ale House, LLC, 702 F.3d 1312, 1326 (11th Cir. 2012) (arguing for the “limited scope of protectable expression in an architectural plan”).

31. As applied, this differences approach will dismiss a claim of infringement upon the finding by the judge of any “minor dimensional discrepancies” or “slight changes” or “incremental modifications” when comparing two house designs for infringement. Home Design Servs. v. Turner Heritage Homes, Inc., 825 F.3d 1314, 1322 (11th Cir. 2016); compare id. (“minor dimensional discrepancies” dispositive) with T-Peg, 459 F.3d at 112 (1st Cir. 2006) (“mere existence of differences is insufficient to end the matter”).

32. This differences approach is the minority rule, albeit an approach repeatedly reaffirmed by the Eleventh Circuit. Intervest, 554 F.3d 914 (11th Cir. 2008); Miller’s Ale House, 702 F.3d 1312 (11th Cir. 2012); Home Design Servs., 825 F.3d 1314 (11th Cir. 2016).

33. Whereas the majority rule applies the standard substantial-similarity test that focuses on *similarities*, the Eleventh Circuit’s minority rule fashioned an architecture-specific test that focuses on *differences*. These two approaches to the same question of how to determine infringement of copyrighted architectural works constitute a Circuit split—one deepened by the Eight Circuit’s focus on “plenty of differences” below. Pet. App. 4a.

34. Importantly, the Circuit split here is an acknowledged one—at least by the Second Circuit and one Circuit Judge of the Eleventh Circuit.

35. The Second Circuit commented that the “Eleventh Circuit” has “chart[ed] a different course” from the standard test of infringement for architectural works. Zalewski v. Cicero Builder Dev. Inc., 754 F.3d 95, 103 (2d. Cir. 2014); id. at 104 (“Courts should treat architectural copyrights no differently than other copyrights. This is what Congress envisioned[.]”); Attia, 201 F.3d at 53 n.3 (2nd. Cir. 1999) (“In general, architectural works are subject to the same standards that apply to other copyrightable works.”).

36. Furthermore, one Eleventh Circuit Judge agrees with the Second Circuit on this issue, calling the Eleventh Circuit’s approach “troubling” and noting that “the Second Circuit aptly summed up the problems with our approach[.]” Home Design Servs., 825 F.3d at 1330-1331 (11th Cir. 2016) (Rosenbaum, J., concurring).

37. Whether one finds it troubling or not, it’s certainly a hugely significant issue to the scope of protection for architectural works. Under the *similarities* approach, differences between two works do not defeat an infringement claim if there are also major similarities. E.g., L.A. Printex Indus. v. Aeropostale, Inc., 676 F.3d 841, 851 (9th Cir. 2012) (It is “entirely immaterial that, in many respects, plaintiff’s and defendant’s works are dissimilar, if in other respects, similarity as to a substantial element of plaintiff’s work can be shown.”).

38. One implication is that the *similarities* approach permits protection “not only in the architectural work taken as a whole [...] but also in protectable *portions* of the work.” T-Peg, 459 F.3d at 115 (1st Cir. 2006) (emphasis added). Like other works, similarity between architectural works can be found where qualitatively important similarities exist between works, even if there are also meaningful differences between them. Id. (“The fact that VTW’s frame might not necessarily result in other elements being taken from Timberpeg’s architectural work is not dispositive.”).

39. The same is not true of the *differences* approach, which can turn on “*minor dimensional discrepancies* between the plans’ rooms, *slight changes* in the presence, arrangement, or function of various features, *incremental modifications* to a number of walls, and a *smattering of other dissimilarities*.” Home Design Servs. v. Turner Heritage Homes, Inc., 825 F.3d 1314, 1322 (11th Cir. 2016).

40. Thus, the two different tests have massive pragmatic significance to the rights of architects. It’s possibly easier to comprehend this significance via analogy to a more familiar type of copyrighted work. Consider a hypothetical novelist who writes a 300-page novel. Then, suppose that a competing author steals 150 pages of the original novel, copying them verbatim. This competing author also adds a chapter or two of her own to the pirated 150 pages. Under the standard *similarity* approach, such copying would clearly be infringement, entitling the original novelist to share in the proceeds of that infringement. Under the *differences* approach, the original novelist wouldn’t have a claim against the competing author because of the very minor differences, despite 150 pages of verbatim copying.

41. What is more, the differences approach is quite extreme. If “minor ... discrepancies” and “slight changes” and “incremental modifications” can defeat a copyright claim, that’s a radical suggestion. Going back to the novel analogy, just using a thesaurus on a handful of words could defeat any potential copyright claim by the actual author of that book, allowing anyone with a thesaurus to perform an end-run around any novelist’s copyrights. In that sense, the differences approach is not just a departure, but a radical diminishment, of the rights in architectural works established by Congress. A very minor adjustment on an architectural design would excuse widespread copying.

42. There are profound infirmities underlying the Eleventh Circuit’s differences analysis. The Second Circuit and one Eleventh Circuit Judge have identified these infirmities at length. Essentially, they boil down to the problem that there is no statutory basis for the differences approach or for not treating architectural works on an equal footing with the other works listed in 17 U.S.C. § 102(a). See Zalewski, 754 F.3d at 103-106; Home Design Servs., 825 F.3d at 1327-1333 (Rosenbaum, J., concurring). But see id. at 1333-1334 (Tjoflat, J., concurring) (defending the differences approach).

43. It’s worth noting another major oversight of the differences approach: where Congress wants to dramatically limit the scope of rights in a particular type of copyrighted work, it does so expressly. For example, sound recordings are imbued with a right of reproduction, a right of derivation, and a right of public distribution, as all copyrighted works are. 17 U.S.C. § 106(1)-(3). Yet, Congress took pains to expressly confirm that those rights were limited in two ways.

44. First, Congress clarified that sound-recording copyrights are not imbued with a general performance right. 17 U.S.C. § 114(a) (“The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).”).

45. Second, Congress expressly clarified the scope of those rights. For example, the reproduction right is expressly limited to exact duplication of the sounds used. 17 U.S.C. § 114(b) (“The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording.”).

46. By contrast, architectural works have no comparable provision in the statute that limits their scope of protection to identical or near-identical duplication when determining what infringes.

47. Likewise, the derivative right in sound recordings is expressly limited to exact sounds that have been “rearranged, remixed, or otherwise altered in sequence or quality.” Id.; Agee v. Paramount Communs., Inc., 59 F.3d 317, 324 (2d Cir. 1995) (“Under section 114(b), the use of a sound recording qualifies as a derivative work only if ‘the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.’” (quoting 17 U.S.C. § 114(b))). No such comparable limitation can be found in the Copyright Act with regard to architectural works.

48. The key point is that the Copyright Act has nowhere expressly limited the rights of architectural works vis-à-vis other works. Rather, in 1990, when Congress passed the AWCPA, it presumably intended that courts would apply the same standards of similarity as they do for most copyrighted works. The text puts architectural works on an equal footing with other types of works. 17 U.S.C. §§ 101, 102(a), 106(1)-(3).

49. For those who use legislative history, the House Report is illuminating: the “same standard” of infringement should be used for architectural works as for other copyrighted works. H.R. Rep. 101-735, at 21 (1990) (“[D]eterminations of infringement of architectural works are to be made according to the same standard applicable to all other forms of protected subject matter.” (emphasis added)).

B. The scope of protection for architectural works presents a tremendously important issue because the differences approach adopted below functionally vitiates much of the protection that Congress granted architects.

i. The differences approach undermines the national uniformity and predictability of copyright protections for architectural works.

50. Resolving the Circuit split about how to treat architectural works under the Copyright Act is particularly important because this issue presents a fracture in the nation's copyright law. Courts have repeatedly stressed the special importance of national uniformity when it comes to copyright. See Bonito Boats v. Thunder Craft Boats, 489 U.S. 141, 162 (1989) (“fundamental purposes” underlying the Constitution’s Copyright Clause to “promote national uniformity in the realm of intellectual property.”). Copyrights, after all, are a federal property right with a Constitutional foundation.

51. Accordingly, courts have been mindful that “the creation of a circuit split would be particularly troublesome in the realm of copyright.” Silvers v. Sony Pictures Entm’t, Inc., 402 F.3d 881, 890 (9th Cir. 2005). That’s because Circuit splits in copyright produce the undesirable effect of leaving “different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide.” Id.

52. That’s true of the acknowledged Circuit split here. Cf. Home Design, 825 F.3d at 1330 (Rosenbaum, J., concurring). Left unresolved, the present Circuit split creates an arbitrary situation in which an architect working in one part of the country will enjoy the ordinary copyright protections in her work, whereas her counterpart working elsewhere in the country will receive judicially watered-down property rights. Such judicially-created inconsistency undercuts Congress’ bestowing both of these architects with the same federal property rights in their creative designs. See 17 U.S.C. §102(a)(8); §106(1)-(3).

53. Moreover, the present Circuit split threatens to frustrate the predictability and certainty that are the cornerstones of an effective federal copyright system. As this Court has recognized, when Congress drafted the Copyright Act a “paramount goal” was “enhancing predictability and certainty” of copyright protections. See Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 749 (1989) (citing H.R. Rep. No. 94-1476). Yet, the divide over how to treat architectural copyrights threatens the Copyright Act’s animating purpose of creating national uniformity, predictability and certainty regarding federal copyright protections.

54. Thus, it is imperative that this Court resolve the acknowledged split presented in this Petition. Whether courts should treat architectural works differently from other works, by subjecting them to lesser copyright protections, despite Congress’ decision to place architectural works on equal footing with other types of works in the Copyright Act, is ripe for this Court’s resolution.

ii. The Circuit split has pervasive implications because it involves a central doctrinal question that is outcome determinative in the bulk of architectural infringement cases and that defines the scope of protection for architectural copyrights nationwide.

55. Substantial similarity is a central doctrine in copyright law. Indeed, as leading intellectual property scholar Mark Lemley notes, “every circuit agrees on the centrality of substantial similarity[.]” Mark A. Lemley, Our Bizarre System for Proving Copyright Infringement 57 J. Copyright Soc’y 719 (2010), Stanford Public Law Working Paper No. 1661434, (August 18, 2010).

56. As such, the Circuit split over whether architectural works should be subject to the traditional similarity analysis, or whether they should instead be subject to an architect-specific differences analysis, implicates a central doctrinal question.

57. The Courts of Appeals are currently entrenched in a divide regarding how to resolve that doctrinal question. And the resolution of that doctrinal question has pervasive, outcome-determinative effects in nearly all cases of architectural infringement.

58. That's because the "heart of copyright infringement cases is 'substantial similarity' between the plaintiff's and the defendant's works." *Id.* Indeed, evaluating "substantial similarity between the plaintiff's and defendant's works is an essential element" of any infringement claim. 4 NIMMER ON COPYRIGHT § 13.03 (2021). As such, one copyright treatise has described the concept of substantial similarity as the "sine qua non of *every* [copyright infringement] determination". Robert C. Osterberg & Eric. C. Osterberg, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW, at xxi (2012) (emphasis added). Thus, the choice between the minority view and the majority view will prove outcome-determinative in the bulk of architecture-infringement cases.

59. The Circuit split over this central doctrinal question also sets the scope of protection for all of the nation's architects. *See Home Design Servs.*, 825 F.3d at 1330 (Rosenbaum, J., concurring) (discussing the division over whether "the protectable expression in an architectural plan is somehow subject to less protection than the protectable expression in any other kind of copyright"). Thus, resolution of the Circuit split is of paramount importance because this doctrine will arise and be outcome-determinative in nearly every architectural infringement case.

60. And, finally, clarifying whether architectural works are subject to the traditional copyright protections focusing on similarities, or are instead subject to a sub-standard protection turning on minute differences, has profound impact on the rights of architects and builders nationwide.

iii. The minority view effectively vitiates the intellectual property rights afforded by Congress to architectural works under the Copyright Act.

61. The transformation of a similarities test into a differences test for architectural works effectively vitiates the intellectual property-rights that Congress established through the enactment of the AWCPA. See 17 U.S.C. §102(a)(8); §106.

62. Indeed, Congress conferred architectural works with the same rights as the other types of works protected under Section 102. Nevertheless, under the minority view, the presence of differences between architectural works precludes a finding of infringement for the similarities between the works.

63. The Eleventh Circuit has made clear that “modest dissimilarities” are significant when comparing architectural works. Home Design, 825 F.3d at 1320. And the Eight Circuit below found that the presence of “differences” between the works precluded a finding of infringement even though a qualitatively significant similarity was present. That is a radical doctrinal departure from how copyright law works.

64. There are major pragmatic effects. Typically, some differences are “entirely immaterial” in the face of substantial similarities. L.A. Printex Indus. v. Aeropostale, Inc., 676 F.3d 841, 851 (9th Cir. 2012) (quoting 4 NIMMER ON COPYRIGHT § 13.03[B][1][a]). Indeed, one is not supposed to go looking for differences. Rather, substantial similarity exists if “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them and regard their aesthetic appeal as the same.” Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (emphasis added). From its venerable inception, the substantial similarity analysis has been focused on identifying similarities—not differences.

65. Thus, the minority view turns substantial similarity on its head for architectural works. It transforms a similarity analysis into a differences analysis, with a hypersensitivity to even “modest differences.”

66. Though this distinction between looking for similarities and looking for differences might seem semantic at first glance, the minority view’s focus on differences has stark pragmatic implications for rightsholders. For example, adding some differences has never been a get-out-of-jail-free card for would-be infringers. As this Court noted, long ago “Judge Learned Hand cogently remarked, ‘no plagiarist can excuse the wrong by showing how much of his work he did not pirate.’” Harper & Row, Publs. v. Nation Enters., 471 U.S. 539, 565 (1985) (citing Sheldon, 81 F.2d at 56). But that’s exactly what an infringer can do for architectural works under the minority rule.

67. Looking at how this differences test would apply in more traditional copyright mediums, it quickly becomes apparent that transforming a similarities test into a differences test functionally strips architects of their rights. Consider the following hypothetical examples.

68. Under the Eleventh Circuit’s approach, a literary pirate could lift Melville’s Moby Dick wholesale, swap out the whale for a minnow, give Ishmael a new moniker, and rename the Pequod. This would-be infringer could then point to a handful of superfluous differences to avoid liability for widespread copying of a book this pirate didn’t write.

69. A film maker could steal two hours of film from Gone With the Wind, add ten minutes of new material and then point to all the differences between the works to avoid the infringement question from ever reaching a jury.

70. Or consider what happened here: rival architects and builders could steal an award-winning, qualitatively significant, rare design (*i.e.*, the triangular atrium design in the underlying case), thereby stealing the “heart of the work” and yet be forgiven if they can point to superfluous differences in standard features like “rooms and stairways of differing shapes, sizes, and orientations[.]” See Pet. App. 4a.

71. That’s never been how copyright works: “As the statutory language indicates, a taking may not be excused merely because it is insubstantial with respect to the *infringing* work.” Harper, 471 U.S. at 565. One cannot simply steal “the heart of the [work]” and then point to how much they did not take (*i.e.* how many differences there are).

72. As this Court noted, that approach risks ignoring the qualitative of what was taken. Id. (citing Roy Export Co. Establishment v. Columbia Broadcasting System, Inc., 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (taking of 55 seconds out of 1 hour and 29-minute film deemed qualitatively substantial)). But, under the minority view’s differences approach, a would-be infringer can be forgiven for what he took from another work by simply pointing to differences between the works.

73. That approach creates a perverse incentive to even a modestly sophisticated copyright infringer. And, the functional effect of the minority view is to create a loophole so large that it swallows the rights of architectural copyrights altogether. Pragmatically then, the minority view effectively presents a judicial near-evisceration of Congressionally created intellectual-property rights in architecture.

74. This is not rhetorical hyperbole or conjecture. Indeed, empirical research bolsters the belief that judicial innovations treating architectural works differently from the other categories of works have radically diluted those rights towards *de facto* non-existence.

75. According to one study examining copyright infringement claims, “the data show huge differences in success rate based on the type of work—ranging from a plaintiff success rate of 53.6% for graphical works to a low of 8.3% for architectural works.” Kevin J. Hickey, Reframing Similarity Analysis in Copyright, 93 Wash. U. L. Rev. 681, 695 (2016).

76. The fact that copyright owners of architectural works prevail fewer than 10% of the time when they show up to court with a claim, as compared to over 50% for other works, is no accident. It’s the product of judicial innovation specifically designed to afford architectural works less protection. As Judge Rosenbaum notes in her concurrence, “the most troubling aspect of our decision in Intervest is our conclusion that judges are more able to conduct the inherently factual and subjective ‘substantially similar’ inquiry in architectural-works cases than jurors.” Home Design, 825 F.3d at 1331. This differences is tailor made in Judge Rosenbaum’s view to undermine the factfinders’ authority to try cases.

77. Ultimately, there are strong reasons to grant the Petition on this question: an acknowledged Circuit split, a statutorily untenable approach by a few Circuits, and a result that rights established by Congress are subject to doctrinal loopholes that functionally swallow those rights altogether.

II. THE CONTINUED RELIANCE ON A PRESUMPTION-TO-FEES APPROACH BY VARIOUS LOWER COURTS RUNS AFOUL OF THIS COURT’S ADMONITIONS IN FOGERTY AND KIRTSAENG, INVITING FURTHER CLARIFICATION ON FEES BY THIS COURT.

78. The Copyright Act permits a discretionary award of attorney fees to the prevailing party. 17 U.S.C. § 505 (“The court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.”). Yet, for a long time there was little guidance for the lower courts about the “proper limits” on courts’ discretion to award copyright fees. See Lieb v. Topstone Indus., 788 F.2d 151, 154 (3rd Cir. 1986).

79. Then, this Court addressed that uncertainty first in Fogerty in 1994 and then again in Kirtsaeng in 2016. In both Fogerty and Kirtsaeng, this Court delineated the proper scope and limits on the district courts’ discretion to award copyright fees. Importantly, in Fogerty, this Court clarified two bright-line rules regarding how the lower courts should decide whether to award fees in copyright cases.

80. For the first bright-line rule, this Court made clear that district courts were *not* allowed to award fees “as a matter of course[.]” Fogerty v. Fantasy, Inc., 510 U.S. 517, 533 (1994). Indeed, this Court took painstaking efforts to disavow three different formulations of the so-called British Rule, under which prevailing parties are entitled to fees as a matter of course. Specifically, Fogerty expressly disavowed:

- (1) awarding “fees as a matter of course”
- (2) the “automatic awarding” of fees
- (3) fees being “regularly awarded”

Id. The mere fact of the lawsuit—and the fact that both sides expended perhaps substantial resources on it—did not entitle a the winner of a copyright lawsuit fee-shifting spoils or even to reimbursement. See id.

81. Fogerty's reasoning for the rejection of various iterations of the British Rule was straightforward: "The word 'may' [in Section 505] clearly connotes discretion. The automatic awarding of attorney's fees to the prevailing party would pretermitt the exercise of that discretion." Id. Thus, Fogerty made clear copyright fees were not to be awarded as a matter of course, as that would be inconsistent with the Act's plain text.

82. Fogerty's second bright line rule was that courts were to award fees in an "evenhanded" manner. Id. at 534 n.19. In other words, neither prevailing defendants nor plaintiffs were to be favored in the fees analysis. In Fogerty, this Court rejected the Ninth Circuits "dual" standard and required instead "an 'evenhanded' approach, under which district courts will apply the same standard to prevailing plaintiffs and defendants when deciding whether to award fees." Id. at 536 (Thomas, J., concurring).

83. Then in Kirtsaeng, this Court again revisited the issue of awarding copyright fees under Section 505. This Court observed the "need for some additional guidance respecting the application of §505." Kirtsaeng v. John Wiley & Sons, Inc., 579 U.S. 197, 203 (2016). And this Court set out to "resolve disagreement in the lower courts about how to address an application for attorney's fees in a copyright case." Id. at 201.

84. Like Fogerty, Kirtsaeng also set forth two important limiting principles governing a district court's discretion to award copyright fees pursuant to Section 505. First, Kirtsaeng issued a new bright line rule: Kirtsaeng made clear that a court must evaluate the objective *reasonableness* of the losing party's position, rather than simply weighing who won. Furthermore, Kirtsaeng warned that "if some court confuses the issue of liability with that of reasonableness, its fee award should be reversed for abuse of discretion." Id. at 208.

85. Second, Kirtsaeng clarified and reiterated Fogerty's rule that "a district court may not 'award[] attorney's fees as a matter of course[.]'" Id. at 202 (citing Fogerty). In Kirtsaeng, this Court also observed that some Courts of Appeals continued to employ a presumption-to-fees approach under which those lower courts were "presuming that a prevailing party receives fees[.]" Id. at 201 n.1 (2016) (citing Hogan Systems, Inc. v. Cybersource Int'l, Inc., 158 F.3d 319, 325 (5th Cir. 1998)).

86. Petitioner's counsel read Kirtsaeng to have demonstrated an awareness of a presumption approach and to have consciously rejected it in favor of an "objective-reasonableness approach" which has a number of virtues as discussed in the opinion itself. Id. at 205. For example, one major virtue is the predictability of an objective-reasonableness approach and how factor that can guide decisions whether to litigate or not.

87. Indeed, it seems that, to the extent that Fogerty was not entirely clear, Kirtsaeng made it entirely clear, *i.e.*, that copyright fee-shifting was not to be presumed, but rather should be the result of weighing factors, most especially objective reasonableness. Indeed, a leading copyright treatise reads Kirtsaeng to have taken copyright fees analysis "all the further from the Fifth Circuit's presumption [approach]." 4 NIMMER OF COPYRIGHT § 14.10[D][5][c][i] (2019) (discussing effects of Kirtsaeng).

88. Thus, it appears that first in Fogerty and then again in Kirtsaeng, this Court foreclosed any presumption in favor of fees. Nevertheless, despite this Court's clear insistence that fees are not to be "awarded as a matter of course" and that fees are not to be "regularly awarded[.]" Fogerty, 510 U.S. at 533, several Circuits continue to apply a presumption-to-fees approach. Such an approach is still employed by the Fifth, Sixth, and Seventh Circuits—and such an approach by the District Court was affirmed by the Eighth Circuit here.

89. As the Fifth Circuit has openly acknowledged: “even against the backdrop of Fogerty’s admonition that fees should not be awarded to prevailing parties as a matter of course, we have repeatedly stated that an award of attorney’s fees to the prevailing party in a copyright action is the rule rather than the exception and *should be awarded routinely*.” Dig. Drilling Data Sys., L.L.C. v. Petrolink Servs., 965 F.3d 365, 386 (5th Cir. 2020) (emphasis added). Those “repeated[.]” statements appear to be an admission of an ongoing deviation by a Court of Appeals from what this Court has ordained.

90. It’s not just the Fifth Circuit. The Sixth Circuit has also adopted the Fifth Circuit’s presumption-to-fees approach: “the granting of fees ‘is the rule rather than the exception and [they] *should be awarded routinely*.’” Bridgeport Music, Inc. v. WB Music Corp., 520 F.3d 588, 592 (6th Cir. 2008) (emphasis added) (citing Positive Black Talk Inc. v. Cash Money Records, Inc., 394 F.3d 357, 380 (5th Cir. 2004)).

91. The Seventh Circuit also employs a presumption-to-fees approach. The Seventh Circuit goes “so far as to suggest, by way of refinement of the Fogerty standard, that the prevailing party in a copyright case in which the monetary stakes are small should have a *presumptive entitlement* to an award of attorneys’ fees.” Gonzales v. Transfer Techs., Inc., 301 F.3d 608, 610 (7th Cir. 2002) (emphasis added).

92. Yet, the Seventh Circuit goes even further. Not only does the Seventh Circuit employ a presumption to fees, but it also favors defendants more than plaintiffs, a *blatant violation* of Fogerty: the Seventh Circuit employs a *defense-side presumption* in favor of fees that is “very strong.” Assessment Techs. of WI, LLC v. Wire Data, Inc., 361 F.3d 434, 437 (7th Cir. 2004) (“When the prevailing party is the defendant, who by definition receives not a small award but no award, the presumption in favor of awarding fees is *very strong*.”).

93. Thus, the Seventh Circuit’s defense-sided presumption appears to run afoul of Fogerty’s demand for an “evenhanded” approach under which district courts must apply the same standard to prevailing plaintiffs and defendants when deciding whether to award fees. See Fogerty, 510 U.S. at 534 n.19.

94. Petitioner’s counsel believe that these lower-court opinions reflect a surprising deviation from this Court’s guidance in Fogerty and Kirtsaeng against regularly awarding fees as a matter of course to the prevailing party and, for the Seventh Circuit, against treating plaintiffs and defendants differently. Whether a Court of Appeals has steadfastly continued with pre-Fogerty presumptions in favor of fees, or purported to “refine” Fogerty into a presumption approach, such refinements seem to be little more than new iterations of the British Rule that was decisively discarded by Fogerty—and for good reason.

95. This Court has repeatedly warned that fees should not be awarded “as a matter of course” to the prevailing party and that fees should not be “regularly awarded” to the prevailing party. It’s even considered a presumption-to-fees approach and passed on it. Nevertheless, multiple Circuits continue to employ a presumption-to-fees approach under which those lower courts say that fees to the prevailing party are “the rule rather than the exception and *should be awarded routinely*.”

96. Those words are not only legally wrong. They are not only a heft deviation from this Court’s instructions in Fogerty and Kirtsaeng. Those few words—“should be awarded routinely”—turn a discretionary fees approach that channels private litigants’ behaviors towards the purposes of the Copyright Act into a kneejerk spoils-to-victors system that wildly deviates from copyright’s purposes.

97. Accordingly, Petitioner James respectfully requests this Court act to enforce its own precedents. These pervasive practices constitute gross error and an abuse of discretion under this Court’s Fogerty and Kirtsaeng holdings. Respectfully, this Court should grant certiorari to address this matter and to provide much needed guidance to the lower courts that a presumption-to-fees approach is simply not the law.

* * * * *

98. Here, the Eighth Circuit affirmed an award of copyright fees under Section 505. The underlying fee award made two legal errors, each of which is an abuse of discretion, rendering affirmance improper:

- The fee award relied on the wrong legal standard, and
- The fee award misapplied the most important factor—the “reasonableness” factor.

Both errors put the fee award in conflict with this Court’s holdings in Kirtsaeng and Fogerty, as detailed below.

99. Notably, the Eighth Circuit itself expressly acknowledged that the District Court’s fee order made misstatements of law, *i.e.*, used an incorrect legal standard. The Eighth Circuit stated as follows: “**To be sure**, the district court was wrong to say that attorney fees ‘are the rule rather than the exception and *should* be awarded routinely’ in cases like this one.” Pet. App. 5a. (bolding supplied; italics added by Eighth Circuit).

100. Yet the Eighth Circuit expressed confidence that the district court “knew it had discretion and exercised it properly.” Id. at 6. Respectfully, the Eighth Circuit overlooked that Kirtsaeng and Fogerty foreclosed affirming copyright fee awards resting on the two legal errors listed above.

101. As a threshold matter, it is well established that “the trial court must apply the correct standard, *and the appeals court must make sure that has occurred.*” Fox v. Vice, 563 U.S. 826, 838 (2011) (emphasis added). A district court abuses its discretion “if it applies the wrong legal standard[.]” United States v. Stover, 650 F.3d 1099, 1106 (8th Cir. 2011). Indeed, a wrong legal standard is “*by definition*” an abuse of discretion. See, e.g., Crossroads Grassroots Policy Strategies v. FEC, 788 F.3d 312, 321 (D.C. Cir. 2015) (emphasis added) (citing Koon v. United States, 518 U.S. 81, 100 (1996)).

102. Here, there is no question that the District Court used the wrong legal standard. As the Eighth Circuit itself noted, “[t]o be sure, *the district court was wrong* to say that attorney fees ‘are the rule rather than the exception and should be awarded routinely[.]’” Pet. App. 5a. Nonetheless, the Eighth Circuit did not find an abuse of discretion despite the fee award’s reliance on an incorrect legal standard, a legal standard that this Court disavowed in both Fogerty and Kirtsaeng.

103. In Fogerty, this Court held that any presumption in favor of fees was incompatible with §505’s text. 510 U.S. at 533. This holding turned on the Copyright Act’s use of a permissive “may” rather than mandatory language. Id. (“The word ‘may’ clearly connotes discretion.”). Therefore, the fee award’s use of mandatory “should” language rather than applying §505’s permissive “may” language was legal error.

104. Simply put, the fee award used the wrong legal standard to determine whether to award copyright fees. Treating copyright fees as “the rule” and stating that they “should be awarded” runs headlong into Fogerty’s holding. Indeed, Fogerty explained that such a presumptive approach to copyright fees “would *pretermitt the exercise of [a court’s] discretion.*” 510 U.S. at 533 (emphasis added).

105. Yet, the Eighth Circuit affirmed a fee award that presumed fees “should” be awarded. That affirmance stripped the District Court of the ability to exercise its discretion and to apply the correct legal rule in the first instance. After all, a “trial court has wide discretion when, but only when, it calls the game by the right rules.” Fox, 563 U.S. at 839.

106. Moreover, the fee award did exactly what this Court instructed not to do. Instead of considering objective reasonableness, the District Court simply referred back to the liability issue it had already decided at summary judgment. Pet. App. 18a (“As described in the Court’s order on summary judgment[...]). Yet what is decided at summary judgment is the merits—not the reasonableness of the losing claims.

107. In this sense, the District Court “conflate[d] two different questions: whether a defendant in fact infringed a copyright and whether [Plaintiffs] made serious arguments” in support of their claims. Kirtsaeng, 136 S. Ct. at 1988. This Court was not coy about what should happen in such a situation: “if some court confuses the issue of liability with that of reasonableness, its fee award should be reversed for abuse of discretion.” Id. (emphasis added).

108. The fee award below committed a legal error that is surprisingly common and pervasive amongst the Courts of Appeals despite this Court’s repeated admonitions that copyright fees are not to be awarded as a matter of course. This Court should grant the petition to give additional guidance to the lower courts.

109. In the view of Petitioners’ counsel, the lower courts have been disregarding or eroding Fogerty’s central holding, either by “refining” Fogerty into a presumption-to-fees approach or purporting to harmonize Fogerty with preexisting presumptions in favor of fees.

110. These presumptions have ruinous consequences for the smallest of copyright holders, who also often have the least access to counsel—especially counsel who are willing to bring such matters to this Court.

111. Respectfully, this Court should exercise its supervisory powers to address the pervasive, improper presumption-to-fees approach being employed by the lower courts, *i.e.*, to course correct in copyright fees.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant the Petition and issue a writ of certiorari, either on the merits or on fees.

In the alternative, Petitioner requests a GVR on the affirmance below of the fee award in light Fogerty and Kirtsaeng.

Respectfully submitted,

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